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IN THE

Supreme Court of the United States

OCTOBER TERM 1953

No.

JOHN A. VENZEL, *Petitioner*

v.

UNITED STATES STEEL COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner John A. Venzel prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered December 15, 1953. Time for filing the petition was extended, first to April 15, 1954, and then to May 14, 1954.

OPINIONS BELOW

The opinion of the District Court (R. 9a) is reported in 117 F. Supp. 385. The opinion of the Court of Appeals (R. 16) is reported in 209 F. 2d 185.

JURISDICTION

The judgment of the Court of Appeals was entered on December 15, 1953 (R. 15). The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTION PRESENTED

Whether the protection of the reemployment provisions of Section 8 of the Selective Training and Service Act of 1940, as amended, covering reemployment in positions "other than temporary," is denied an employee because, under the collective bargaining agreement governing his employment, he receives no seniority credit during the first three months of employment (though at the end of three months the first three months are counted) and may during that period be laid off or discharged as exclusively determined by the employer (except for union membership).

STATUTE INVOLVED

The pertinent provisions of Section 8 of the Selective Training and Service Act of 1940, 54 Stat. 885, 50 U.S.C. App. §308 (1946), are set forth in Appendix A. The corresponding provisions of the Universal Military Training and Service Act currently in effect, are insofar as pertinent herein, identical to the provisions of the Selective Training and Service Act of 1940, as amended. 50 U.S.C. App. §459 (Supp. 1952).

STATEMENT

This action was brought by a veteran who returned to respondent's employ from military service to enforce his rights under Section 8 of the Selective Training and Service Act of 1940, as amended (R. 2a). The district court's judgment on the pleadings (R. 13a) was affirmed by the court below on the ground petitioner held a position

"other than temporary" and so was without the protection of the statute (R. 17).

Petitioner was originally employed by respondent on June 16, 1943 (R. 3a). He left this position on September 13, 1943 to enter military service, after working 89 days (R. 3a). The collective bargaining agreement between respondent and United Steelworkers of America, CIO, governing petitioner's employment at this time provided (R. 3a):

> "New employees and those hired after a break in continuity of service will be regarded as probationary employees for the first three (3) months of their employment and will receive no continuous service credit during such period. Probationary employees may be laid off or discharged as exclusively determined by Management provided that this provision will not be used for purposes of discrimination because of membership in the Union. Probationary employees continued in the service of the Company subsequent to three (3) months from date of original hiring shall receive full continuous service credit from date of original hiring."

Petitioner was honorably discharged from military service on May 19, 1946 (R. 4a). He resumed his employment with respondent on May 28, 1946 (R. 4a). On such resumption, respondent required him to serve a new probationary period (R. 4a), which petitioner did; when petitioner completed this additional period, respondent granted him seniority as of May 28, 1946, the date he returned to work after military service (R. 4a). Petitioner brought this action to compel respondent to grant him seniority from June 16, 1943—the date of his original employment prior to military service (R. 5a). On pleadings setting forth the above facts, together with the fact that petitioner would have completed his initial probationary term satisfactorily on September 16, 1943 (R. 4a, 5a), the district court entered judgment for respondent (R.

13a). The court below affirmed, on the ground petitioner's position prior to military service was not "other than temporary" and the statute did not protect him.

REASONS FOR GRANTING THE WRIT

1. The Issue Affects Many Persons and Is of General Importance

The contract provision under which Venzel was serving a probationary period when he entered military service is found, in substance, in practically all collective bargaining agreements between United Steelworkers of America, CIO, and companies in the steel and certain other industries. As of December 31, 1953, out of a total of 2,159 such agreements covering 1,135,420 production and maintenance workers, 1978 agreements covering 1,110,316 workers had a similar probationary clause; and out of 108 agreements covering 21,526 office and clerical workers, 96 agreements covering 20,279 workers had a similar probationary clause.

Due to the importance of the issue in labor relations in the steel industry, the United Steelworkers of America appeared *amicus curiae* below, and, at petitioner's request, counsel for said union are representing petitioner here.

In addition to being almost universal in the steel industry, probationary provisions of this type are widely prevalent in other industries. See "Collective Bargaining Provisions—Seniority," U. S. Dept. of Labor, Bureau of Labor Statistics Bulletin No. 908-11 (1949), pp. 6-13. A study by the Bureau of National Affairs of trends in bargaining as of January 1, 1954 showed probationary clauses included in 75% of the agreements examined. BNA, Collective Bargaining Negotiations and Contracts, Sec. 15, p. 286. Thus, the impact of the decision below

is general and its dislocating effect on labor relations is substantial.

Many thousands of persons now entering military service may be expected to leave probationary employment and to be without reemployment rights if the decision below stands. A recent survey made by the Census Bureau for the Department of Agriculture showed 69% of those separated from military service were employed in the year preceding their entrance into the armed forces. U.S. Dept. of Agriculture, Agriculture Information Bulletin No. 120 (1954), p. 3. An earlier check of some 9,000 separation notices received in Selective Service offices in twenty-three states in a thirty-day period showed a corresponding figure of 64% having pre-military service jobs.

With a turnover of approximately one million annually in the armed forces, upwards of 600,000 veterans have reemployment rights each year. While not all of these veterans enter service from a probationary status, of course, the present policy of procuring the bulk of the armed forces from the 18-19 year age groups makes it probable that a large proportion of new entrants into military service are on the threshold of their working careers, and so likely to be in probationary status. Under the decision below, this large group of employees will unavoidably fall behind their fellow employees who do not go into the armed forces, and they will suffer a loss of seniority which will last as long as their employment. Indeed, the decision below, of necessity, denies them even the right to reemployment on release from the armed forces.

Because of the importance of reemployment rights of probationers in the steel industry and other industries as well, and because of the many thousand young workers who will need the protection of the statute and are denied it by the decision below, this Court should review that decision.

II. The Decision Below Is in Conflict with Decisions of Other Circuits

In *Payne v. Wright Aeronautical Corp.*, 162 F. 2d 549, the Court of Appeals for the Third Circuit reached a conclusion opposite the one below. Article XIII, paragraph 4, of the bargaining agreement there involved, provided that in case of layoff, an employee must have had "six months of actual work" in an occupation before he could displace employees with less seniority than his own. Some of the veterans (e.g., plaintiff Pompeo, Supplemental Appendix of Petitioners-Appellants, p. 105a) claimed displacement rights in positions in which they had not worked six months at the time they entered military service. The court held they acquired seniority rights *in such positions* six months after beginning work in them, even though they were then in military service.

Since Venzel does not claim that military service counts toward completion of the probation, but concedes he must complete the remainder of it after returning from military service, and since satisfactory performance was required as a matter of course in both situations, the cases are in all essentials the same. In fact, the delay in acquisition of seniority rights in *Payne*, being twice as long as in the present case, would more reasonably be thought to make the position "temporary", if such consideration is at all relevant; yet the veterans there were held entitled under the statute to more than Venzel claims. The conflict in rationale of the cases cannot be explained away by the fact that the probationer here is denied access to the grievance procedure during probation; the same is true of every employee who is not a member of a labor organization, and it has never been thought such an employee is "temporary" under this Act.

Moreover, the decision below is in conflict, in principle, with decisions holding that employment at will is "other than temporary" and such an employee is protected by the

statute. *Loeb* v. *Kivo*, 169 F. 2d 346 (C.A. 2, 1948) (artificial flowers salesman); *Levine* v. *Berman*, 161 F. 2d 386 (C.A. 7, 1947) (rug salesman); *Trusteed Funds, Inc.* v. *Dacey*, 160 F. 2d 413 (C.A. 1, 1947) (investment trust publicity manager); *Martin* v. *John S. Doane Co.*, 164 F. 2d 537 (C.A. 1, 1947) (manager of liquor concern). The delay in acquisition of seniority and the lack of access to grievance procedure—the only differences between Venzel and non-probationary employees—were equally present in these cases. Indeed, such at will employees normally never acquire the type of seniority and grievance rights enjoyed by employees covered by collective bargaining agreements. Yet the veterans in the at will cases were not denied statutory protection on the ground they were "temporary" employees.

III. The Decision Below Is Probably Erroneous and Not in Accord with Supreme Court Interpretation of the Statute

In order to receive the protection of the statute, it is not necessary that the employee hold a permanent position; it is only necessary that the position be "other than temporary." Probationary employment shows the distinction to be one of substance. While not yet permanent, such employment is also not necessarily expected to end in a brief and definite time. The most unfavorable view possible of such employment is that its duration is uncertain; yet this would not exclude it from the usual meaning of "other than temporary," and still less would it do so under the "liberal construction" of the statute in favor of veterans required by *Fishgold* v. *Sullivan Corp.*, 328 U.S. 275 (1946).

Practically speaking, of course, the veterans are on the seniority escalator even during their probationary period, given satisfactory work on their part (which every employee must furnish). As the National Labor Relations Board, an expert agency in the field of labor relations,

said in granting probationers the right to vote in union representation elections: "Probationary employees such as those involved here, receive and hold their employment *with a contemplation of permanent tenure*, subject only to the satisfactory completion of an initial trial period. Their general conditions of work in other respects, and their employment interests, are like those of regular employees." (Emphasis supplied.) *National Torch Tip Co.*, 107 NLRB No. 269, 33 LRRM 1369 (February 26, 1954).

Likewise, the Department of Labor, charged under the statute with administrative assistance to veterans seeking reemployment, and an agency expert not only in this field but in labor problems generally, has uniformly followed the view that probationary employment is not *ipso facto* "temporary" so as to be outside the Act. Bureau of Veterans' Reemployment Rights, "Question and Answer Handbook" (1952), pp. 27-29.

The holding of the court below is a negation of the "escalator" or "continuous employment" principle followed consistently by this Court, most recently in *Oakley* v. *Louisville & N.R. Co.*, 338 U.S. 278. The principle has lately been ignored, as here, in two other recent cases. There was an express repudiation of this principle in *Diehl* v. *Lehigh Valley R. R. Co.* (C.A. 3, March 3, 1954) and the rather surprising view that the statute protects only the position the employee leaves for military service in *Bostian* v. *Seaboard Airline R. Co.*, (C.A. 4, April 5, 1954). The latter decision, of course, would mean that even if probationary employment were other than temporary, the statute would not protect the veteran after he has been reinstated and then advanced beyond probationary status.

The decision below therefore represents a step in the process of chiseling away of a part of the veteran's statutory protection, contrary to repeated admonitions of this Court. On this account, it should be reviewed.

CONCLUSION

For the above reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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May 14, 1954

APPENDIX A

Selective Training and Service Act of 1940, as Amended
Reemployment Provisions

Section 8. (a) Any person inducted into the land or naval forces under this act for training and service, who, in the judgment of those in authority over him, satisfactorily completes his period of training and service under section 3(b) shall be entitled to a certificate to that effect upon the completion of such period of training and service, which shall include a record of any special proficiency or merit attained. In addition, each such person who is inducted into the land or naval forces under this act for training and service shall be given a physical examination at the beginning of such training and service; and upon the completion of his period of training and service under section 3(b), each such person shall be given another physical examination and, upon the written request of the person concerned, shall be given a statement of medical record by the War Department; PROVIDED, That such statement shall not contain any reference to mental or other conditions which in the judgment of the Secretary of War or the Secretary of Navy would prove injurious to the physical or mental health of the person to whom it pertains.

(b) In the case of any such person who, in order to perform such training and service, has left or leaves a position, other than a temporary position, in the employ of any employer, and who (1) receives such certificate, (2) is still qualified to perform the duties of such position, and (3) makes application for reemployment within ninety days after he is relieved from such training and service or from hospitalization continuing after discharge for a period of not more than one year—

(A) If such position was in the employ of the United States Government, its Territories or posses-

sions, or the District of Columbia, such person shall be restored to such position or to a position of like seniority, status, and pay;

(B) if such position was in the employ of a private employer, such employer shall restore such person to such position or to a position of like seniority, status, and pay unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so;

(C) if such position was in the employ of any State or political subdivision thereof, it is hereby declared to be the sense of the Congress that such person should be restored to such position or to a position of like seniority, status, and pay.

(c) Any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) shall be considered as having been on furlough or leave of absence during his period of training and service in the land or naval forces, shall be so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces, and shall not be discharged from such position without cause within one year after such restoration.

* * *

(e) In case any private employer fails or refuses to comply with the provisions of subsection (b) or subsection (c), the district court of the United States for the district in which such private employer maintains a place of business shall have power, upon the filing of a motion, petition, or other appropriate pleading by the person entitled to the benefits of such provisions, to specifically require such employer to comply with such provisions, and, as an incident thereto, to compensate such person for any loss of wages or benefits suffered by reason of such employer's unlawful action. The court shall order a speedy hearing in such

case and shall advance it on the calendar. Upon application to the United States district attorney or comparable official for the district in which such private employer maintains a place of business, by any person claiming to be entitled to the benefits of such provisions, such United States district attorney or official, if reasonably satisfied that the person so applying is entitled to such benefits, shall appear and act as attorney for such person in the amicable adjustment of the claim or in the filing of any motion, petition, or other appropriate pleading and the prosecution thereof to specifically require such employer to comply with such provisions: PROVIDED, That no fees or court costs shall be taxed against the person so applying for such benefits.

* * *

(g) The Director of Selective Service herein provided for shall establish a Personnel Division with adequate facilities to render aid in the replacement in their former positions of, or in securing positions for members of the reserve components of the land and naval forces of the United States who has satisfactorily completed any period of active duty, and persons who have satisfactorily completed any period of their training and service under this act.

Act of Sept. 16, 1940, c. 720, § 8, 54 Stat. 890 (as amended July 28, 1942, c. 529, § 2, 56 Stat. 724; Dec. 8, 1944, c. 548, § 1, 58 Stat. 798; June 29, 1946, c. 522, § 1, 60 Stat. 341) 50 U.S.C. App. § 308 (1946).

STATEMENT OF QUESTION INVOLVED.

From the pleadings can it be determined as a matter of law that the plaintiff-appellant, in order to perform military training and service, did not leave a position, "other than a temporary position," in the employ of the defendant-appellee?

The District Court answered "Yes."

Appellant contends that it should have answered "No."

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No. 11,805.

United States Court of Appeals

FOR THE SIXTH CIRCUIT.

JOHN A. VENZEL,

Plaintiff-Appellant,

vs.

UNITED STATES STEEL COMPANY,

Defendant-Appellee.

CIVIL No. 27,961.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, EASTERN DIVISION.

BRIEF OF APPELLANT.

STATEMENT OF FACTS.

The plaintiff was originally hired by the defendant on June 16, 1943. The plaintiff left this position on September 13, 1943, to enter military service.

When plaintiff was originally hired the prevailing collective bargaining agreement, dated September 1, 1942, provided:

> "New employees and those hired after a break in continuity of service will be regarded as probationary employees for the first three (3) months of their employment and will receive no continuous service credit during such period. Probationary employees may be laid off or discharged as exclusively determined by Management, provided that this provision will not be used for purposes of discrimination because of membership in the Union. Probationary employees continued in the service of the Company subsequent to three (3) months from date of original

hiring shall receive full continuous service credit from date of original hiring."

While plaintiff was in the military service a new collective bargaining agreement was executed on March 13, 1945. This new agreement lessened the period of probationary employment to 260 hours of work in contrast to the three month period specified in the agreement of September 1, 1942, but in all other respects contained the same language as set forth in the prior agreement.

The plaintiff was honorably discharged from the military service on May 19, 1946. Plaintiff resumed his employment with the defendant on May 28, 1946, but upon his return to work, defendant treated plaintiff as a new employee and required him to complete a new probationary period. Defendant thereupon granted plaintiff seniority as of May 28, 1946, the date on which he returned to work.

Plaintiff filed suit under the reemployment section of the Selective Training and Service Act of 1940, as amended, to be restored to his position without being required to serve any further probationary period, having completed more than a 260-hour probationary period prior to the time he left defendant's employ to enter the military service, and to have his seniority dated from June 16, 1943, the date of original hiring; *or in the alternative* to be restored to such position for completion of his 3 month probationary period and upon completion thereof to have his seniority dated from June 16, 1943, the date of original hiring.

After answering, defendant filed a motion under Rule 12(c) of the Federal Rules of Civil Procedure for judgment on the pleadings. The District Court granted this motion and ordered that a judgment as a matter of law be entered in favor of the defendant. This appeal is from that judgment.

ARGUMENT.

From the pleadings can it be determined as a matter of law that the plaintiff-appellant, in order to perform military training and service, did not leave a position, "other than a temporary position," in the employ of the defendant-appellee?

The District Court answered "Yes."

Appellant contends that it should have answered "No."

(1) THE STATUTE UPON WHICH PLAINTIFF'S CLAIMS ARE BASED.

Section 8 of the Selective Training Service Act of 1940, as amended, 50 U. S. C. App. § 308, hereinafter referred to as the Act, provides:

> "(a) Any person inducted into the land or naval forces under this act for training and service, who, in the judgment of those in authority over him, satisfactorily completes his period of training and service under section 3 (b) shall be entitled to a certificate to that effect upon the completion of such period of training and service, which shall include a record of any special proficiency or merit attained * * *
>
> (b) In the case of any such person who, in order to perform such training and service, has left or leaves a position, other than a temporary position, in the employ of any employer, and who (1) receives such certificate, (2) is still qualified to perform the duties of such position, and (3) makes application for reemployment within ninety days after he is relieved from such training and service or from hospitalization continuing after discharge for a period of not more than one year * * *
>
> (A) * * *
>
> (B) If such position was in the employ of a private employer, such employer shall restore such

person to such position or to a position of like seniority, status, and pay unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so; * * *"

(2) THE RULE OF LIBERAL CONSTRUCTION OF THE STATUTE.

In *Fishgold v. Sullivan Drydock & Repair Corp. et al.*, 328 U. S. 275, 285 (1946), the Supreme Court set forth the rule of liberal construction of the Act, stating:

> "This legislation is to be liberally construed for the benefit of those who left private life to serve their country in its hour of great need * * * and no practice of employers or agreements between employers and unions can cut down the service adjustment benefits which congress has secured the veteran under the Act. Our problem is to construe the separate provisions of the Act as parts of an organic whole and give each as liberal a construction for the benefit of the veteran as a harmonious interplay of the separate provisions permits."

(3) DEFINITIONS OF TEMPORARY.

Temporary has been defined as:

> "Lasting for a time only; existing or continuing for a limited time; * * * *Webster's New International Dictionary* (2nd ed.); *Bouvier, Law Dictionary* (Century ed. 1948).

On two occasions in this circuit, the Court expressly rejected any hint that the word "permanent" be read into the statute. In *Bryan v. Griffin*, 166 F. 2d 748, 750 (C. C. A. 6th Cir. 1948), the following language, approved of in *E. I. Du Pont de Nemours v. Martin*, 174 F. 2d 602 (1949), this Court stated:

> "Section 308 (b) does not define the positions covered as permanent. It simply defines them as

'other than temporary.' The purpose of the Act was 'to protect the veteran in several ways. He who was called to the colors was not to be penalized on his return by reason of his absence from his civilian job. He was, moreover, to gain by his service for his country an advantage which the law withheld from those who stayed behind * * *[citations omitted] * * *.' 'Temporary,' we think, means 'lasting for a time only,' or casual, as distinguished from regular. It does not apply to continuing service such as was rendered by this appellant. Since employment for an indefinite period was contemplated in a position to be held at mutual will until terminated, we think the position was 'other than temporary' * * *."

The following cases are in accord with this view:

Foor v. Torrington Co., 170 F. 2d 487, 489 (C. C. A. 7th Cir);

Smith v. Lestershire Spool & Mfg. Co., 86 F. Supp. 703, 705 (D. C. N. Y. 1949).

Therefore, it is manifest that the statute did not state nor contemplate that only those leaving permanent positions obtained the benefits of the Act; rather, it is stated that those leaving "a position other than a temporary position" receive the benefits of the Act.

It is clear then that a veteran may leave a position which was not of a permanent nature—but something less—and still be covered under the Act. If the Congress had intended that only those who left permanent positions were within the scope of the Act it could very easily have so phrased the statute. This conclusion is merited not only by the plain import of the phrase in the statute but also by the rule of liberal construction set forth in the *Fishgold* case. This plaintiff, occupying a probationary status, may not have possessed a permanent position, but

neither did he occupy a position "lasting for a time only" or "casual." What the plaintiff did occupy was a probationary status—a "regular position"—which by mere lapse of time (in this plaintiff's case one more day) would have ripened into a position of permanency with all its attendant benefits.

(4) A PROBATIONARY POSITION MAY BE A POSITION OTHER THAN TEMPORARY UNDER THE ACT.

In order to determine whether or not a veteran has left a position other than a temporary one the economic realities of the employment relationship should be examined. Thus, it was expressly held by the Supreme Court that agreements between employers and unions cannot cut down the reemployment benefits secured the veteran under the Act. *Fishgold v. Sullivan Drydock & Repair Corp. et al.*, 328 U. S. 275, 285 (1946). A court should not use abstract tests or formulae in determining a disputed relationship under the Act. *Kay v. General Cable Corp.*, 144 F. 2d 653, 654 (C. C. A. 3rd Cir. 1944), nor should it rely exclusively on the terms of the contract of employment but rather it should analyze the nature of the position held by the employee. *Trusteed Funds Inc. v. Dacey*, 160 F. 2d 413, 418 (C. C. A. 1st Cir. 1947).

The true issue is not whether under the contract between the union and the Company the Plaintiff may be considered to be in a temporary position but whether under all the facts and circumstances surrounding the employment relationship he was *in fact* in a temporary position. Thus, in *Spearman v. Thompson*, 167 F. 2d 626, 630 (C. C. A. 4th Cir. 1948) where the prevailing contract provided that seniority as a mechanic should not begin until after three years service as a mechanic, the Court stated:

> "But a contractual provision denying an ex-serviceman seniority to which he is entitled under the * * * Act is invalid * * *. The contract therefor cannot deprive appellants of their seniority as mechanics if *in fact* they were mechanics at the time of their induction." (Emphasis mine.)

Furthermore, it has been held that even when it is conceded that as between a veteran and the union the veteran is a temporary member, the employment relationship will be examined to determine whether or not it is a temporary one. *Coon v. Liebmann Breweries,* 86 F. Supp. 333, 336 (D. C. N. J. 1949).

The instant case is one of original impression for there is no authority in the country which has held that one in a probationary employment relationship holds a temporary position as a matter of law. There are four decided cases which are similar but clearly distinguishable from the case at bar.

In *Johnson v. Interstate Lines,* 71 F. Supp. 882, aff'd. 163 F. 2d 125 (1947), the plaintiffs were employed as student drivers and were to remain on a probationary status until they completed "a satisfactory examination" and obtained the written approval of the employing officials. The plaintiffs asked for but the Court denied a seniority rating *during the probationary term.* The affirmation of this decision by the Court of Appeals was solely on jurisdictional grounds.

In *Doyle et al. v. Division No. 1127 of Amalgamated Ass'n. of Street Electric Ry. & Motor Coach Employees of America, et al.,* 76 F. Supp. 655, aff'd. 168 F. 2d 876 (1947), the plaintiffs, who had experience only on a probationary status in camp-shuttle operations, asked for a seniority status as inter-city drivers. The evidence proved that the driving of a bus in the inter-city route was a more com-

plicated job and called for more competent personnel than the driving of a bus in the camp-shuttle operations. Under the prevailing collective bargaining agreement, seniority status was to begin when a bus driver was given a satisfactory rating on the inter-city line. The plaintiffs asked for but the Court denied *seniority ratings during the probationary term.* Also, the Court ruled that positions as drivers in camp-shuttle operations were temporary because they originated with the war and ended with the cessation of hostilities; this latter ruling was expressly refuted by this circuit in *Bryan v. Griffin, supra.*

In *Lesher v. P. R. Mallory & Co., Inc.,* 166 F. 2d 983 (C. C. A. 7th, 1948), the plaintiffs asked for *seniority rights during the probationary term.* The collective bargaining agreement in effect at the time provided that an employee must continue in the service of the company for 90 days before being entitled to seniority rights, and before that time an employer could discharge an employee without cause. Also, the evidence proved that a probationary employee's work was actually rated as to its satisfactory or unsatisfactory quality. The Court refused to give the plaintiffs a *seniority status during the probationary term.*

In *Meredith v. Industrial Rayon Corp.,* Civil No. 24689 (D. C. Ohio, 1949) the plaintiff asked for and the court refused to give a *seniority rating during a probationary term.* The Court stated that "* * * the plaintiff never got on the seniority escalator." The court never held that the plaintiff left a temporary position. The Court relied on the *Lesher* case for its ruling that where one is a probationary employee before he enters the service and the prevailing collective bargaining contract provides that seniority is to begin after the probationary term, the veteran cannot obtain seniority rights during his military service.

All four of the above cases are authority for the proposition most succinctly set forth in the *Lesher* case at page 985:

> "* * * a veteran is * * * entitled to be restored to the same *status* which he would have occupied had his employment been uninterrupted by military service * * * if the veteran had no seniority status at the time he left his employment for military service then he acquired none while in the service. Thus, plaintiffs if they had been reemployed would have had no seniority standing because they had none when they left for military service. *At most, if entitled to restoration, it would be only to positions they held at the time they left for service, without seniority rights.*" (Emphasis mine.)

In the present case, the plaintiff is not asking for a seniority status to be accumulated while he was in the service. He would not be entitled to that because he was not on the seniority escalator prior to entering the military service. Rather, the plaintiff is asking to "be restored to the same status he would have occupied had his employment been uninterrupted by military service" and that is restoration to the same position he would have held at the time he left for service, without seniority rights.

All of the above cases are distinguishable from the instant case on the following grounds: (1) all of them were decided on facts presented at the trial or on stipulated facts and (2) in each of these cases the veterans asked for seniority rights although prior to entering the service they had not been on the seniority escalator. Also, in the *Lesher, Johnson,* and *Doyle* cases there was an actual proficiency test and qualification rating given to probationary employees.

In the case at bar, the District Court held that the plaintiff prior to entering service had a temporary position

merely on the basis that the collective bargaining agreement set forth in plaintiff's pleading referred to plaintiff as a probationary employee subject to discharge and layoff without cause by the employer. Furthermore, there was nothing from the pleading to indicate that during the plaintiff's probationary period his work was rated and his proficiency tested. And finally, and this is the crux of the matter, *the plaintiff here did not pray for accrued seniority rights during the time he was in the service.* What the plaintiff did ask for was a *status,* the status he occupied before he went into the service. Thus, the plaintiff asked that he get the benefit of the new 260 hour probationary period so that he will be deemed to have completed his probationary term prior to his entering the service or that he be restored to his position for completion of the three month probationary period.

Under the rule promulgated in *Oakley v. Louisville & Nashville Railroad Co.,* 338 U. S. 278, 283 (1949) an honorably discharged veteran, is:

> "* * * entitled by the act to be restored not to a *position* which would be the precise equivalent of that which he left when he joined the Armed Forces, but rather to a *position* which, on the moving escalator of terms and conditions affecting that particular employment, would be comparable to the *position* which he would have held if he had remained continuously in his civilian employment." (Emphasis mine.)

In the case at bar, this either means that plaintiff is entitled to have the benefit of the new 260 hour probationary period, *Aeronautical Lodge v. Campbell,* 338 U. S. 521, 525, since he already was on the escalator of terms and conditions affecting his employment before he entered military service, or he is at least entitled to be restored to the status he had prior to entering the military service, that

is, restoration to his position to complete the one day left of his probationary term.

It should be observed that the plaintiff in either event noted above would receive a seniority status as of June 16, 1943, the date of original hiring. This would follow not because the plaintiff is receiving any seniority rights under the statute but rather because he is receiving a *status* under the statute which under either collective bargaining agreement requires that plaintiff's seniority be dated from June 16, 1943, the date of original hiring.

Thus, under the statute the veteran is entitled to be restored to a position of "like seniority, status, and pay." In the present case, the veteran cannot be the recipient of seniority rights *under the statute* for he had none prior to entering the service, but he is entitled to the separate item of "status" enumerated in the statute. The "status" which he acquires under the statute will entitle him to a seniority rating *under the contract* and distinct from any statutory seniority rights.

(5) A JUDGMENT ON THE PLEADINGS WAS NOT A PROPER METHOD OF DISPOSING OF THE ISSUES IN THIS CASE.

As has been clearly indicated in the above discussion there is no authority in the country supporting the proposition that a probationary employee as a matter of law occupies a temporary position under the Act. On the contrary, in *United States of America (Robert E. Milotsky) v. Brown & Bigelow et al.* (D. C. Minn. 1951) wherein employees were referred to as "temporary" employees for the first six months of their employment and after six months continuous employment a seniority rating was given from the date of hiring, the court held that the plaintiff was entitled to the benefits of the Act. Furthermore,

even the defendant in the *Meredith* case in his brief accompanying his motion for a new trial admitted that a probationary employee is not necessarily a temporary employee and cited to that effect a field letter issued by the Solicitor's office of the Department of Labor on March 23, 1948, which stated:

> "Probationary Employment * * * *may* under certain union contracts be considered temporary until the completion of the agreed probationary period." (Emphasis mine.)

Also, the Court may observe that if the veterans in the *Lesher* case had not asked for seniority ratings during their probationary terms but had merely asked to be restored to their positions for completion of their probationary terms the Court may well have acceded to their requests. Thus, in Judge R. N. Wilkin's original opinion in the *Meredith* case, uncomplicated by the seniority rights during the probationary term cases of *Lesher, Doyle,* and *Johnson, supra,* but only directed to the question of whether probationary was equated to temporary, it is stated:

> "While the terms of the employment contract seem to justify a classification of the plaintiff as a temporary employee because he has not served more than six months, it is the view of this court that the terms of the statute must prevail and that the intent of the statute cannot be avoided by contract of employment."

Adding to the above cited authorities the rule of liberal construction of the Act laid down in the *Fishgold* case, *supra,* it is manifest that a holding as a matter of law that a probationary employee is a temporary one subverts the intent of Congress. Especially is this true when courts in general have not regarded with favor the granting of

judgments on the pleadings, *Betsch et al. v. Umphrey*, 252 Fed. 573, 574 (C. C. A. 9th 1918), and have held that if there is any probability or possibility of the sufficiency of the pleadings or any reasonable doubt as to their sufficiency a judgment on the pleadings should not be granted, *Betsch et al. v. Umphrey, supra*; *Ulen Contracting Corp. v. Tri-County Electrical Cooperative*, 3 Fed. Rules Service, § 12, c. 23 (D. C. Minn. 1940); *Schwartzman v. United Air Lines Transport Corp.*, 10 Fed. Rules Service, § 12, c. 23 (D. C. Neb. 1947); *Hutchison v. New Amsterdam Casualty Co.*, 17 Fed. Rules Service, § 15 a. 21 (D. C. Pa. 1952) [a motion for judgment on the pleadings will not be granted "unless it appears to a certainty that the plaintiff would not be entitled to relief under any state of facts which could be proved in support of his claim"]; 5 *Cyclopedia of Federal Procedure*, § 15.226 ["a motion for judgment on the pleadings cannot be granted where material and relevant issues of fact are, or probably, or even possibly are presented by the pleadings"].

(6) THE ABSENCE OF PROTECTED TENURE, ACCESS TO GRIEVANCE PROCEDURES AND SENIORITY RIGHTS DO NOT MAKE A POSITION TEMPORARY UNDER THE ACT.

Under either of the collective bargaining contracts involved in the instant case, a probationary employee could be laid off or discharged as exclusively determined by the defendant. Therefore, in both of the contracts the employment of the plaintiff was "for an indefinite period * * * in a position to be held at mutual will until terminated * * *." Thus, the plaintiff's employment comes within the exact terms of the rule laid down in *Bryan v. Griffin*, 166 F. 2d 748, 750 (C. C. A. 6th Cir. 1948) and approved of in *E. I. Du Pont de Nemours v. Martin*, 174 F.

2d 602 (1949); in accord: *Trusteed Funds Inc. v. Dacey*, 160 F. 2d 413, 418, 419 (C. C. A. 1st Cir. 1947); *Daniels v. Barfield*, 71 F. Supp. 884, 886, 887, (D. C. Pa. 1947).

Finally, it is clear that although this plaintiff during his probationary term did not have access to union grievance procedures and did not have seniority rights, this had no effect in determining the question of whether he left a position other than a temporary position to enter the service. Reemployment benefits under the Act do not depend on the veteran's possession of seniority rights and union grievance procedures. *O'Connor v. Yardley Golf Club*, 171 F. 2d 40 [veteran was a golf professional]; *Van Doren v. Van Doren Laundry Service, Inc.*, 162 F. 2d 1007 [veteran was an office manager and purchasing agent]; *Kay v. General Cable Corp.*, 144 F. 2d 653 [veteran was a medical director]; *Loeb v. Kivo*, 169 F. 2d 346 [veteran was a salesman]; *Schreier v. M. H. Fishman Co.*, 176 F. 2d 722 [veteran was a store manager].

RELIEF.

In conclusion, the plaintiff-appellant prays that the judgment of the District Court be reversed and that it be ordered that defendant-appellee's motion for judgment on the pleadings be overruled; and that a trial on the material issues of fact presented by the pleadings be ordered.

Respectfully submitted,

MARVIN S. ZELMAN,

Attorney for Plaintiff-Appellant.

Civil No. 27,961.

In the United States District Court

FOR THE NORTHERN DISTRICT OF OHIO,
EASTERN DIVISION.

JOHN A. VENZEL,
Plaintiff,

vs.

THE UNITED STATES STEEL CO.,
Defendant.

DOCKET ENTRIES.

* * * * *

10-23-51. Amended complaint filed. (Ans. day 11-22-51.)

* * * * *

3-25-52. Answer filed. Copy mailed 3-24-52.

6-6-52. Motion of defendant for judgment on the pleadings and brief filed. Copy mailed 6-6-52.

6-11-52. Stipulation and order substituting U. S. Steel Co. as party deft. in place of Nat'l Tube Co. filed, McNamee, *J.* Noted 6-11-52. Notice waived.

* * * * *

8-15-52. Pltf's memo. in opposition to motion for judgment on the pleadings with affidavit in support filed. Copy mailed 8-15-52.

9-29-52. Memo. opinion. (Motion for judgment on pleadings granted.) McNamee, *J.* Noted 9-29-52. Copies to counsel.

10-7-52. Judgment ordering that judgment be entered in favor of the defendant and against the plaintiff; costs assessed against the pltf. filed, McNamee, *J.* Noted 10-7-52. Notice waived.

10-10-52. Motion of plaintiff for rehearing and brief filed.

10-15-52. Defendant's brief in opposition to motion for rehearing filed. Copy mailed 10-15-52.

11-3-52. Notice of appeal filed. Copy mailed by clerk 11-3-52.

11-24-52. (Motion for rehearing denied) McNamee, J. Noted 11-24-52. Copies to counsel.

11-26-52. Order denying plaintiff's motion for rehearing filed. McNamee, J. Noted 11-26-52. Copies to counsel.

12-1-52. Motion to extend time for filing record of appeal granted filed. Jones, J. Noted 12-1-52. Notice waived.

1-23-53. All of original papers and pleadings mailed to Clerk of United States Court of Appeals.

1-27-53. Acknowledgment of receipt of original papers filed. (Case No. 11,805 in U. S. C. A. and filed there 1-26-53.)

AMENDED COMPLAINT.

(Filed Oct. 23, 1951.)

(1) Now comes the plaintiff, John A. Venzel, by his attorney, Don C. Miller, United States Attorney, and John S. Mudri, Assistant United States Attorney, and for his cause of action says that jurisdiction of this Court is based upon the provisions of section 8(e) of the Selective Training and Service Act of 1940, as amended (Act of September 16, 1940, c. 720 sec. 8, 54 Stat. 890; U. S. C. Title 50 (App.), sec. 308), hereinafter called the Act, and section 7(a) of the Service Extension Act of 1941, as amended (Act of August 18, 1941, c. 362 sec. 7, 55 Stat. 627; U. S. C. Title 50 (App.) sec. 357).

(2) Plaintiff further says that he brings this action for assignment of his seniority in the defendant's employ

to which the act entitles him, and for such other relief as the Court may determine that he be entitled to.

(3) That the defendant is now and at all times hereinafter mentioned was engaged in the business of fabricating iron and steel pipe and tubing with a place of business in the City of Lorain, County of Lorain, State of Ohio.

(4) That the plaintiff was originally hired by the defendant on June 16, 1943 at Lorain, Ohio, for a position the duties and functions of which were permanent in nature and which still exists in the employ of defendant. Plaintiff's tenure in this position was then governed by the provisions of section 6 of a collective bargaining agreement, dated September 1, 1942, which stated as follows: "New employees and those hired after a break in continuity of service will be regarded as probationary employees for the first three (3) months of their employment and will receive no continuous service credit during such period. Probationary employees may be laid off or discharged as exclusively determined by Management, provided that this provision will not be used for purposes of discrimination because of membership in the Union. Probationary employees continued in the service of the Company subsequent to three (3) months from date of original hiring shall receive full continuous service credit from date of original hiring."

(5) That plaintiff left this position on September 13, 1943 to enter the military service. While still in the military service, a new collective bargaining agreement became effective on March 13, 1945 which changed the period during which new employees did not acquire seniority from three months to 260 hours of actual work. Section 8 of said revised agreement which has remained in force at all times herein material after that date, provides as follows: "New employees and those hired after a break in continuity of service will be regarded as probationary employees for the first two hundred and sixty (260) hours of actual work and will receive no continuous service credit during such period. Probationary employees may

be laid off or discharged as exclusively determined by Management, provided that this provision will not be used for purposes of discrimination because of membership in the Union. Probationary employees continued in the service of the Company subsequent to the first two hundred and sixty (260) hours of actual work shall receive full continuous service credit from date of original hiring."

(6) That plaintiff was honorably discharged from the military service on May 19, 1946 and possesses a certificate of satisfactory performance of military service and has otherwise met all requirements of Section 8 of the act.

(7) That plaintiff resumed his employment with defendant on May 28, 1946 but that upon return to work, defendant treated him as a new employee and required him to complete a new probationary period of 90 days following his reinstatement. Defendant thereupon granted him seniority from May 28, 1946, the date on which he returned to work. Plaintiff's work at all times has been satisfactory.

(8) That plaintiff had completed more than a 260 hour probationary period prior to the time he left defendant's employ to enter military service. Having satisfied the requirement of Section 8 of the collective bargaining agreement of March 13, 1945, which was in effect when he returned to employment, plaintiff was entitled under the act to be restored to his position without being required to serve the further probationary period and that his seniority therefore dated from his original employment by the company on June 16, 1943.

(9) That plaintiff maintains that the three-month probationary period provided in section 6 of the collective bargaining agreement dated September 1, 1942 was no longer in effect when he resumed his employment on May 28, 1946; but that even if the three-month probationary period was still deemed operative, plaintiff had completed 89 days of such 90 day period prior to the time he left defendant's employ to enter the military service. Plaintiff was therefore entitled under the act to be restored to such

position for completion of his probationary period and upon satisfactory completion thereof to have his seniority dated from his original employment by the company on June 16, 1943.

(10) WHEREFORE, plaintiff prays that the defendant be required to date his seniority from June 16, 1943 and be enjoined from reducing such seniority except as a consequence of a change in the seniority system affecting all similarly situated employees.

DON C. MILLER,
United States Attorney,
JOHN S. MUDRI,
Assistant United States Attorney,
Attorneys for the Plaintiff.

ANSWER.

(Filed March 25, 1952.)

(1) The defendant admits the allegations of paragraph 1 of the plaintiff's amended complaint.

(2) The defendant admits the allegations of paragraph 2 of the plaintiff's amended complaint.

(3) The defendant admits the allegations of paragraph 3 of the plaintiff's amended complaint.

(4) The defendant admits that the plaintiff was hired by the defendant on June 16, 1943 at Lorain, Ohio, that the plaintiff's tenure of employment was governed by the collective bargaining agreement as alleged, and that the agreement contained the section quoted by the plaintiff. The defendant denies the remaining allegations of paragraph 4 of the plaintiff's amended complaint.

(5) The defendant admits the allegations of paragraph 5 of the plaintiff's amended complaint.

(6) The defendant admits the allegations of paragraph 6 of the plaintiff's amended complaint.

(7) The defendant admits that the plaintiff was employed by the defendant on May 28, 1946, that the defendant treated the plaintiff as a new employee and required him to complete a new probationary period, that the defendant granted the plaintiff seniority from May 28, 1946, and that the plaintiff's work has been satisfactory. The defendant denies the remaining allegations of paragraph 7 of the plaintiff's amended complaint.

(8) The defendant admits that the plaintiff had performed more than 260 hours of work before he left the defendant's employ to enter military service, and that on May 28, 1946, when the plaintiff was employed by the defendant, the collective bargaining agreement dated March 13, 1945 was in effect. The defendant denies the remaining allegations of paragraph 8 of the plaintiff's amended complaint.

(9) The defendant admits that the plaintiff had completed only 89 days of the three month probationary period provided in Section 6 of the collective bargaining agreement dated September 1, 1942 and that the collective bargaining agreement dated September 1, 1942 was not in effect on May 28, 1946. The defendant denies the remaining allegations of paragraph 9 of the plaintiff's amended complaint.

WHEREFORE, the defendant prays that the plaintiff's amended complaint be dismissed and that the defendant have judgment for its costs.

JAMES C. DAVIS,
SQUIRE, SANDERS & DEMPSEY,
Attorneys for the Defendant.

DEFENDANT'S MOTION FOR JUDGMENT ON THE PLEADINGS.

(Filed June 6, 1952.)

Now comes the defendant, National Tube Company (The United States Steel Company was substituted as the Defendant on June 11, 1952), and moves this Court for Judgment on the pleadings for the reason that the plaintiff's amended complaint and the defendant's answer disclose that there is no genuine issue between the plaintiff and the defendant as to any material fact involved in the plaintiff's action, and that the defendant is entitled to judgment against the plaintiff as a matter of law.

JAMES C. DAVIS,
Attorney for Defendant.

SQUIRE, SANDERS & DEMPSEY,
Of Counsel.

EXHIBIT A.

Affidavit of Michael A. Melia.

(Attached as an Exhibit to Plaintiff's Brief Opposing Defendant's Motion for Judgment on the Pleadings.)

COUNTY OF CUYAHOGA,
STATE OF OHIO, SS:

Michael A. Melia, residing at 1347 Madison Avenue, Lorain, Ohio, being first duly sworn, deposes as follows:

I am Staff Representative for the United Steelworkers of America, C. I. O., District 28. During the past ten years since I have held this position and for the five years previously as Union Committeeman, I have been in constant and nearly daily contact with the officials of the National Tube Company in Lorain, Ohio (known since January 1,

1952 as the U. S. Steel Company) in connection with the personnel and employment practices of that company in so far as they have related to the interest of the Union members whom I represent.

It is a fact that until 1951 all employees hired by the National Tube Company were in positions of indefinitely permanent duration, not temporary, and not limited in any way as to tenure. I know and hereby state as fact that the employment of John A. Venzel by the National Tube Company on September 1, 1942, was likewise for a permanent duration, not temporary, and not limited in any way as to tenure. In 1951 for the first time did the National Tube Company employ any workers on a temporary basis.

I further state that in my capacity as Staff Representative for the United Steelworkers of America, C. I. O., I have dealt constantly and continuously during the past ten years with officials of the National Tube Company with respect to the terms and conditions of the Collective Bargaining Agreements of September 1, 1942, March 13, 1945 and of those subsequently effectuated. Because of that fact I am thoroughly familiar with the meaning of the provisions contained in those agreements and the manner in which they have been construed in practice both by the National Tube Company and by the United Steelworkers of America, C. I. O. Particularly with reference to the probationary period of three months provided in Section 6, of the September 1, 1942 agreement, and the probationary period of 260 hours provided in Section 8 of the March 13, 1945 agreement, those probationary periods were never intended in principle, and have never been applied in practice as limitations upon the duration or tenure of any employment, including that of John A. Venzel, or to make such employments temporary in any meaning of the word. Such probationary periods were intended only, and have been applied in practice, to give the National Tube Company a period of three months or of 260 hours, as the case may be, to lay off or discharge a new employee, free of any right by the Union to intercede

or to require grievance procedure to be applied. Likewise the fact that such employee acquired no seniority during the probationary period did not in any way make the position temporary, but meant merely that the acquisition of seniority, dating back to day of original hiring, required the passage of the required time before it vested. At the end of the probationary period, there were no tests, examinations or the imposition of other formal criteria. The probationary periods were only periods when the company could exercise its unchallenged right to lay off or discharge. Conversely the only requirement upon the employee was to perform his work as instructed and to avoid doing anything which would merit lay off or discharge.

MICHAEL A. MELIA.

Sworn to and subscribed before me this 13th day of August, 1952.

ALBERT SIMON,
Notary Public.
Commission expires November 8, 1952.

MEMORANDUM OPINION OF COURT ON MOTION FOR JUDGMENT ON THE PLEADINGS.

(September 29, 1952.)

Invoking the provisions of Section 8 of the Selective Training and Service Act of 1940, Tit. 50 U. S. C. App. Sec. 308, as amended, 50 U. S. C. App. Sec. 357, plaintiff seeks to have his seniority rights as an employee of the defendant fixed as of June 16, 1943.

In its Answer defendant admits all the material allegations of the Complaint but denies that plaintiff is entitled to the relief sought. The questions here presented arise upon defendant's Motion for Judgment on the Pleadings.

Plaintiff contends that a material issue of fact is presented by defendant's denial of the allegation in the Complaint "That the plaintiff was originally hired by the defendant on June 16, 1943 at Lorain, Ohio for a position the duties and functions of which were permanent in nature and which still exists in the employ of the defendant."

However, there is no dispute about the applicable provisions of the agreement governing the plaintiff's status as an employee at the time of his separation from his original employment; nor is there any dispute about the facts relating thereto. Therefore no genuine issue of material fact is raised by the denial of the above-quoted allegation in the Complaint.

Plaintiff originally became an employee of the defendant on June 16, 1943. His period of continuous employment terminated 89 days thereafter, on September 13, 1943, when he entered the military service. During this period the collective bargaining agreement of September 1, 1942 between the union and the defendant was in effect. Among other things it provided that:

> "New employees and those hired after a break in continuity of service will be regarded as probationary employees for the first three (3) months of their employment and will receive no continuous service credit during such period. Probationary employees may be laid off or discharged as exclusively determined by Management, provided that this provision will not be used for purposes of discrimination because of membership in the Union. Probationary employees continued in the service of the Company subsequent to three (3) months from date of original hiring shall receive full continuous service credit from date of original hiring."

Plaintiff was honorably discharged from the military service in May, 1946 and again hired by defendant on May 28, 1946. At that time he was considered a new employee.

On March 13, 1945 a new collective bargaining agreement was executed which reduced the probationary period

of a new employee to 260 hours. This latter agreement was in effect at the time the plaintiff was hired upon his return from the military service. At the end of this probationary period the plaintiff was assigned a seniority status as of May 28, 1946.

The pertinent part of the Selective Training & Service Act of 1940 provides that any person who leaves "a position, other than a temporary position" to enter the military service shall upon release therefrom, upon receiving the certificate therein described and upon compliance with the terms of the Act, be restored "to such position or to a position of like seniority, status, and pay unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so; * * *"

It is the plaintiff's claim that under the provisions of the Act he is entitled to seniority rights effective as of the date of the commencement of his original hiring on June 16, 1943. In support of this claim he argues (a) that his original employment was a permanent position and that his period of continuous employment of less than three months did not operate to prevent the accrual of his continuous service rights, and (b) that he is entitled to have the lesser probationary period of 260 hours provided by the collective bargaining agreement of March 13, 1945 applied as determinative of his probationary period under his original employment.

The authorities are uniform in holding that whether an employee's position is temporary is to be determined by the collective bargaining agreement in effect during the period of his employment prior to his entrance into the military service. *Lesher v. P. R. Mallory & Co., Inc.*, 166 F. (2d) 983; *Doyle v. Division No. 1127*, 76 F. Supp. 655 (D. C. La., 1947); *Meredith v. Industrial Rayon Corp.*, No. 24689, decided by this Court, October 3, 1949.

In the *Lesher* case the court said:

"That under the terms and conditions of this employment the petitioner, during his first ninety days of employment was on probation; that the probationary character of his employment made his position a tem-

porary one within the terms of the Selective Service Act; that since the position which petitioner left was a temporary position, respondent was not compelled under the Act to restore him to such position or to any other position."

In the *Meredith* case, Judge Jones of this Court expressed the same view in the following terms:

"An examination of the authorities and the union agreement leads the Court to the conclusion that the plaintiff did not acquire seniority rights under the agreement before he had completed six months of employment. So far as the agreement provides he was on a trial or probationary basis. Seniority rights do not accrue under these circumstances while the plaintiff is in the service and not employed by the defendant.

* * *

The Court is of the opinion that the case of *Lesher v. P. R. Mallory & Co., Inc.*, 166 F. (2d) 983, states the correct law as it is applicable to this case."

Section 6 of the collective bargaining agreement of September 1, 1942, which governs the plaintiff's rights here, expressly provides that "probationary employees for the first three months of their employment will receive no continuous service credit during such period." Thus, an employee whose continuous period of probationary service was 3 days, 10 days, or any lesser period than the full three months specified in the contract was ineligible for continuous service credit. Plaintiff's period of continuous service being for a lesser period than three months, he was not entitled to receive continuous service credit at the time he left his employment on September 13, 1943.

In the *Lesher* case the court cites with approval several cases construing the word "position" to mean "the employment and not the particular job the employee was performing," and concludes its discussion on this point with the following statement, which is adopted as being applicable here:

"The purpose of the Act, as we have shown, was to preserve for veterans upon their return the employment status they occupied at the time they left for military service, and not to create a status which they never had, even though it might have been attained had they not been called." (p. 986.)

Plaintiff's second contention may be disposed of with brief comment. Concededly, plaintiff's original continuous employment was 89 days, which is more than 260 hours. However, by the terms of the collective bargaining agreement of March 13, 1945 the probationary period of 260 hours therein specified applies only to employees hired after the effective date of the agreement. Nowhere in this agreement is it provided that the new probationary period of 260 hours is to be retroactively applied.

Plaintiff's brief in opposition to the motion is accompanied by an affidavit of one Michael A. Melia. This affidavit is excluded from consideration.

For the reasons hereinabove indicated defendant's Motion for Judgment on the Pleadings is sustained.

CHARLES J. MCNAMEE, *Judge.*

JOURNAL ENTRY.

(Filed Oct. 7, 1952.)

Now on this ____ day of October, 1952, the Motion of the Defendant for Judgment on the Pleadings filed herein having come on for hearing, and the Court having examined the pleadings and considered the briefs and arguments presented by counsel for the parties finds that the pleadings on file show that there is no genuine issue as to any material fact and that the Defendant is entitled to a judgment as a matter of law.

WHEREFORE it is hereby ordered, adjudged and decreed that judgment be entered in favor of the Defendant and against the Plaintiff and that the costs herein be assessed against the Plaintiff.

CHARLES J. McNAMEE,
Judge.

Approved as a form only.

[fol. 15] IN THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 11,805

JOHN A. VENZEL, Appellant,

vs.

UNITED STATES STEEL COMPANY, Appellee

MINUTE ENTRY OF ARGUMENT AND SUBMISSION, DATED DECEMBER 2, 1953, OMITTED IN PRINTING

[fol. 16] IN THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 11,805

JOHN A. VENZEL, Appellant,

vs.

UNITED STATES STEEL COMPANY, Appellee

JUDGMENT—Filed December 15, 1953

Appeal from the District Court of the United States for the Northern District of Ohio.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Ohio, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

[fol. 17] IN THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 11,805

JOHN A. VENZEL, Appellant,

vs.

UNITED STATES STEEL COMPANY, Appellee

Appeal from the United States District Court for the Northern District of Ohio, Eastern Division.

OPINION—Filed December 15, 1953

Before Martin, McAllister and Miller, Circuit Judges.

Per Curiam. The appellant was originally employed by the appellee on June 16, 1943. He left this employment on September 13, 1943 to enter military service.

The prevailing collective bargaining agreement, dated September 1, 1942, provided:

> "New employees and those hired after a break in continuity of service will be regarded as probationary employees for the first three (3) months of their employment and will receive no continuous service credit during such period. Probationary employees may be laid off or discharged as exclusively determined by Management, provided that this provision will not be used for purposes of discrimination because of membership in the Union. Probationary employees continued in the service of the Company subsequent to three (3) months from date of original hiring shall receive full continuous service credit from date of original hiring."

Appellant was honorably discharged from the military service on May 19, 1946, and resumed his employment with the appellee on May 28, 1946 at which time appellee treated appellant as a new employee requiring him to complete a new probationary period, and granted him seniority as of [fol. 18] May 28, 1946, the date on which he returned to work. Appellant filed this action under the provisions of the Selective Training and Service Act of 1940, as amended,

50 U. S. C. App., Sec. 301-318, claiming that he was entitled under Sec. 8 of the Act to be restored to his position as of September 13, 1943, when he left to enter military service, for completion of his probationary period, and upon satisfactory completion thereof to have his seniority dated from his original employment by the appellee on June 16, 1943. The District Judge sustained the appellee's motion for judgment on the pleadings. This appeal followed.

Section 8 of the Act provides that in the case of any person who upon induction into service "leaves a position, other than a temporary position, in the employ of any employer," if such position was in the employ of a private employer, such employer, upon compliance by the employee with certain conditions, "shall restore such person to such position or to a position of like seniority status, and pay unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so, . . ."

We agree with the view expressed by the District Judge, namely, that the amended complaint states the material facts which are not in dispute, thus presenting a pure question of law for the Court; that in determining whether or not the appellant left a position other than a temporary position when he was inducted into service, we must consider the status of the particular employee in the position which he then occupied rather than the permanency of the job which may at times be filled by either a permanent or a temporary employee, *Salzman* v. *London Coat of Boston, Inc.*, 156 Fed. (2d) 538, C. A. 1st; that in determining this question we must consider the provisions of the collective bargaining agreement in effect during the period of his employment prior to his entrance into the military service; that in the present case, a probationary employee is a temporary employee; and that in leaving his position before the completion of his probationary period, he did not leave "a position other than a temporary position," within the meaning of the Act, and accordingly did not qualify for the benefits provided by the Act. *Lesher* v. *P. R. Mallory & Co., Inc.*, 166 Fed. (2d) 983, C. A. 7th; *Johnson* v. *Interstate Transit Lines*, 71 Fed. Supp. 882, affirmed 163 Fed. (2d) 125, C. A. 10th; *Doyle* v. *Division No. 1127, etc.*, 76 Fed. Supp. 655, affirmed 168 Fed. (2d) 876; *Meredith* v.

Industrial Rayon Corp., No. 24689, Northern District of Ohio, 1949.

[fol. 19] In *Bryan* v. *Griffin,* 166 Fed. (2d) 748, C. A. 6th, relied on by appellant, we held that an employment for an indefinite period in a position to be held at mutual will until terminated was employment in a position other than temporary. Such employment is not similar to the probationary employment in the present case, which was expressly limited to three months and was on a trial basis.

The judgment is affirmed.

[fol. 20] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 21] IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1953

No. —

JOHN A. VENZEL, Petitioner,

vs.

UNITED STATES STEEL COMPANY

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

Upon consideration of the application of counsel for petitioner(s),

It is ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including April 15, 1954.

(S.) Stanley Reed, Associate Justice of the Supreme Court of the United States.

Dated this fifth day of March, 1954.

[fol. 22] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1953

No. —

JOHN A. VENZEL, Petitioner,

vs.

UNITED STATES STEEL COMPANY

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

Upon consideration of the application of counsel for petitioner(s),

It is ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including May 14th, 1954.

(S.) Stanley Reed, Associate Justice of the Supreme Court of the United States.

Dated this eighth day of April, 1954.